IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

STEPHEN C. LEONARD, Plaintiff, vs. JOHN F. AULT, WILLIAM H. SOUPENE, HARRY BROWN, STEVE HEBRON, RUSSELL BEHRENDS, MIKE BICKFORD, MARVIN KURT, KATHY LINT, PHIL KAUDER, NANCY KUCERA, JOHN SPENCE, GARY MAYNARD, DENNIS LABARGE, SUE VANAMCRONGEN, Defendants.	No. C03-0121-LRR ORDER

Before the court is the plaintiff's motion to alter or amend the judgment. The plaintiff submitted such motion on November 24, 2003.

In his motion to alter or amend the judgment, the plaintiff asserts several arguments in support of his position that the court should allow him to proceed in forma pauperis. Those arguments can be summarized as follows: 1) the court erred when it included cases decided prior to the effective date of the PLRA; and 2) the court erred because it overlooked his deliberate indifference to his broken and twisted toe claim which qualifies under the imminent danger of serious physical injury exception found in 28 U.S.C. § 1915(g). As relief, the plaintiff asks the court to:

> 1) Allow [him] the opportunity to pay [the $150.00 filing fee] in a lump sum in order to avoid dismissal based solely on the three strikes provision of [the] PLRA.

> 2) Reverse [the] dismissal [order] under [the] 'imminent danger of serious physical injury' exception to the three strikes provision of [the] PLRA.

With respect to the plaintiff's first argument, the court finds it fails because the application of the three strikes provision, even when the three triggering dismissals occurred before the passage of the PLRA, does not have an impermissible retroactive effect. Stated differently, triggering dismissals which occurred prior to the passage of the PLRA count against the plaintiff. See, e.g., Ibrahim v. District of Columbia, 208 F.3d 1032, 1033-37 (D.C. Cir. 2000); Welch v. Galie, 207 F.3d 130, 132 (2d Cir. 2000); Altizer v. Deeds, 191 F.3d 540, 545 (4th Cir. 1999); Medberry v. Butler, 185 F.3d 1189, 1192 (11th Cir. 1999); Wilson v. Yaklich, 148 F.3d 596, 604 (6th Cir. 1998); Rivera v. Allin, 144 F.3d 719, 730 (11th Cir. 1998); Patton v. Jefferson Correctional Ctr., 136 F.3d 458, 461-62 (5th Cir. 1998); Tierney v. Kupers, 128 F.3d 1310, 1311-12 (9th Cir. 1997); Keener v. Pennsylvania Bd. of Probation & Parole, 128 F.3d 143, 144-45 (3d Cir. 1997); Lyon v. Vande Krol, 127 F.3d 763, 765 (8th Cir. 1997); Arvie v. Lastrapes, 106 F.3d 1230, 1231-32 (5th Cir. 1997); Evans v. McQueen, No. 97-6471, 1997 U.S. App. LEXIS 26886 at *1-2 (4th Cir. 1997); Adepegba v. Hammons, 103 F.3d 383, 385-87 (5th Cir. 1996); Green v. Nottingham, 90 F.3d 415, 419-20 (10th Cir. 1996).[1] See also Lewis v. Sullivan, 279 F.3d 526, 528 (7th Cir. 2002) (collecting cases and concluding there is no constitutional right to subsidy); Higgens

[1] The court notes the three strikes provision does not govern lawsuits filed by inmates prior to the effective date of the PLRA. See Altizer, 191 F.3d at 544-47; Gibbs v. Ryan, 160 F.3d 160, 162-64 (3d Cir. 1998); Chandler v. District of Columbia Dep't of Corrections, 145 F.3d 1355, 1358-59 (D.C. Cir. 1998); Canell v. Lightner, 143 F.3d 1210, 1212 (9th Cir. 1998); Garcia v. Silbert, 141 F.3d 1415, 1416 (10th Cir. 1998); Abdul-Wadood v. Nathan, 91 F.3d 1023, 1025 (7th Cir. 1996); White v. Gregory, 87 F.3d 429, 430 (10th Cir. 1996). Cf. Adepegba, 103 F.3d at 386-87 (holding application of 28 U.S.C. § 1915(g) to appeals filed prior to the effective date of the PLRA is not impermissibly retroactive).

v. Carpenter, 258 F.3d 797, 798-801 (8th Cir. 2001) (finding the district court in Ayers v. Norris, 43 F. Supp. 2d 1039, 1044-51 (E.D. Ark 1999), incorrectly analyzed 28 U.S.C. § 1915(g) because it need survive only a rational basis test, not a strict scrutiny test) (reviewing 28 U.S.C. § 1915(g) under rational basis test and finding it to be constitutional), *cert. denied* Early v. Harmon, 535 U.S. 1040, 122 S. Ct. 1803, 152 L. Ed. 2d 659 (2002). Accordingly, the court did not err when assessing whether the plaintiff filed at least three frivolous actions.

Regarding the plaintiff's second argument, the court finds it fails because 28 U.S.C. § 1915(g)'s use of the present tense means that the requisite imminent danger of serious physical injury must exist when the action is filed, not when the underlying events occurred. See Martin v. Shelton, 319 F.3d 1048, 1050 (8th Cir. 2003) (citing Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998) and Abdul-Akbar v. McKelvie, 239 F.3d 307, 312 (3d Cir. 2001)) (holding prisoner did not demonstrate entitlement to the imminent danger exception to 28 U.S.C. § 1915(g) because the requisite imminent danger of serious physical danger needed to exist at the time the complaint or appeal is filed, not when the alleged wrongdoing occurred). See also Malik v. McGinnis, 293 F.3d 559, 562-63 (2d Cir. 2002); Medberry, 185 F.3d at 1192; Banos v. O'Guin, 144 F.3d 883, 885 (5th Cir. 1998). Prior to filing his complaint, the plaintiff transferred from the Anamosa State Penitentiary in Anamosa, Iowa to the Iowa State Penitentiary in Fort Madison, Iowa. Thus, the plaintiff's complaint does not sufficiently allege "imminent danger of serious physical injury" within the meaning of the statute.

In sum, the plaintiff's arguments in his motion to alter or amend the judgment are devoid of merit. Further, although it did not conduct an initial review of the claims the plaintiff included in his complaint, the court notes all seven appear to be wholly without merit. Given the fact the claims in the plaintiff's complaint appear to be frivolous and the number of times he previously filed frivolous actions, it is difficult to imagine a situation

where application of the three strikes provision is more appropriate. Accordingly, the plaintiff's motion to alter or amend the judgment is denied and the previous judgment of dismissal stands.

IT IS SO ORDERED.

DATED this 2nd day of December, 2003.

LINDA R. READE
JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA